IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 156 OF 2005
AND
CHAMBER SUMMONS NO. 402 OF 2005
IN
SUIT NO. 3750 OF 2000

Laxmidas S. Shetty & Anr. ... Plaintiffs
Versus
Vinodkumar V. Kanabar & Ors.. ... Defendants

Ms. Deepa Juvekar i/b S.B. Prabhavalkar for Plaintiffs.

Mr. Jaydeep Deo for P.K. Dhakephalkar for defendants.

CORAM : SMT. R.S. DALVI, J.
DATE : 2ND FEBRUARY 2007

JUDGMENT

1) This chamber summons is for allowing the defendants to withdraw the money deposited by the plaintiffs with the Court Receiver together with interest, if any accrued thereon.

2) The suit is filed for declaration that an agreement / transfer deed dtd. 1/8/2000 executed between the parties for transfer from the plaintiff to the defendants of flat no. 18, 1st Floor, Santacruz Mansion No. 3 Co-op. Housing Society, Nehru Road, Near Post Office, Santacruz (East), Mumbai is bad in law. The defendants have filed counter claim for specific performance of the suit agreement and for possession of the suit flat.

3) The suit has been filed on 8/9/2000. The Plaintiffs' possession came to be protected by an interim order until the defendants followed due legal process for recovery of possession in respect of the suit flat.

4) Thereafter in the notice of motion no. 1485 of 2000, an ad-interim order came to be passed on 20/7/2001 that the plaintiff would deposit Rs.15.00 Lacs within three months from the order and upon failure, Court Receiver would be appointed. The notice of motion came to be disposed of by an order dtd. 29/9/2003 in which the order of deposit was set aside. The defendants were asked to take out proceedings which they were entitled to in law and the Court Receiver which was appointed was discharged without passing accounts. Whilst the Court Receiver remain appointed in the suit pending that notice of motion, the plaintiff was directed to pay Rs.5,500/- per month to the Court Receiver as royalty. That amount has been paid by the plaintiff and stands to the credit of the suit. The defendant has applied in this chamber summons for withdrawal of that amount. The plaintiff has opposed the withdrawal on the ground that the deposit order made at an interim stage in

the defendants notice of motion has been vacated and the Court Receiver who was appointed has been discharged. Hence, the plaintiffs claim withdrawal and oppose the withdrawal by the defendants.

5) The order in the notice of motion was carried in appeal. The order in notice of motion was confirmed and the defendants were directed to take out appropriate proceedings. The defendants have accordingly filed counter claim.

6) In another notice of motion taken out by the defendants no. 2326 of 2006, the plaintiff agreed to pay Rs.7500/- as compensation. An order accordingly came to be passed with plaintiffs' consent. The Plaintiff has deposited R.7,500/- per month in the Court and the defendant has been withdrawing that amount.

7) It is the defendant's case that as he is withdrawing the amount paid as compensation after filing the counter-claim, he must also be allowed to withdraw the lesser earlier amounts directed to be paid by the plaintiff as and by way of royalty to the Court Receiver.

8) The transfer deed dtd. 1/8/2000 has been

produced in the court of the Metropolitan Magistrate in the criminal complaint filed by the Defendants herein against the Plaintiffs under Section 506(ii) and Section 34 of the Indian Penal Code. It is the case of the plaintiff that documents have been executed under coercion and mis representation. The plaintiffs had earlier taken a loan from the defendants. The agreement was executed under coercion because the loan was not repaid and the defendants wanted security.

9) It is the defendants' contention that was a usual, genuine transaction in which the defendants have paid consideration and has paid stamp duty as well as transfer fees on the agreement. The defendants have produced the bank pass book showing the said transaction. The bank pass book shows deposit of Rs.9.00 Lacs in the defendants account on the same day as the withdrawal of Rs.9.00 Lacs for payment of consideration to the plaintiff. Four deposits of Rs.3,00,000/-, 2,00,000/-, 2,00,000/- and 2,00,000/- and one withdrawal of Rs.9,00,000/- in the name of first plaintiff are the entries of 3/8/2000. The society transfer fee of Rs.25,000/- is paid on 16/8/2000. The stamp duty of Rs.82,816/- has been paid in cash on 7/9/2000. The criminal complaint has been filed by

the defendants on 15/12/2000.

10) To meet this case, the plaintiff has shown that the transaction was sham and the defendants got agreement executed by the plaintiff when the previous loan was taken by the plaintiff and remained outstanding and after payment of Rs.9,00,000/-, the defendants got a bank account opened in the name of the plaintiff no. 1 where the cheque of Rs.9,00,000/- came to be credited on 3/8/2000 and another bearer cheque without the name of the payee came to be signed by plaintiff no. 1 such that the defendants withdrew the sum of Rs.9,00,000/- deposited in that account on that date itself. The plaintiffs have produced the bank's statement of Account No. 17955 certified by Central Bank of India showing debit as well as credit entries of Rs.9,00,000/- of 3/8/2000 itself. The plaintiffs have also produced a xerox copy of the bearer cheque for Rs.9,00,000/- also bearing bank stamp of the same date and showing the withdrawal by defendant No. 1. The plaintiffs have further produced the certificate of the bank showing the said transaction and the fact that the account was introduced by the defendant No.1.

11) It is prima facie seen that the entire

exercise to create evidence has taken place on 3/8/2000 itself. The credit and debit entries in the defendant's passbook are on 3/8/2000. The credit as well as debit entries in the plaintiff's account introduced by defendant no. 1 is also of 3/8/2000. Both the bank accounts show the transaction of one day. The plaintiff's possession has been protected. The defendants have adopted due legal process by filing counter claim and the plaintiffs have agreed to pay Rs.7500/- which is being deposited by the plaintiffs and withdrawn by the defendants.

12) This is not a case simplicitor of requiring withdrawal of amounts left to be withdrawn after an order came to be passed discharging the Court Receiver. The case of the plaintiff that the transaction is sham is not a case made out simplicitor by way of an oral statement, but prima facie substantiated by bank documents. The defendant's case that the amount of loan remains due and payable and therefore the amount deposited at the rate of Rs.5500/- per month during the period that the Court Receiver was in possession should be appropriated towards the payment of the loan cannot be accepted because that is not the due legal process adopted by the defendants for the

recovery of the amount of loan. The defendants have chosen to take law in their hands. They have got an agreement for sale executed when in fact a loan amount alone was due and payable. Instead of adopting a remedy for recovery of their amount, they have chosen to by-pass the legal process by adopting proceeding for recovery of possession of the flat under documents got executed after the loan amount was granted to the plaintiff. The appropriation of such loan cannot be allowed in a suit / counter claim of the defendants which is in respect of relief in respect of the flat and not the return of loan. The Court would give out an extremely wrong signal if it allows parties to take whatsoever proceeding they deem fit which is not in accordance with law or upon cause of action which came to be concocted. The appropriation by the defendants towards the loan can only be allowed when the defendants have filed a suit for recovery of loan. That has not been done. The amount has been deposited as royalty with the Court Receiver. The Court Receiver came to be appointed by way of an interim order in the application of the defendants. That order came to be set aside in the Notice of Motion. The order in appeal from that notice of motion confirmed the order in the notice of motion. The appointment of the Court Receiver

is therefore seen by two Courts as not a remedy needed in the suit. Pursuant to the same order, the Court Receiver handed back possession to the party from whom he took possession. The Court Receiver must, therefore, also return the amount paid by that party.

13) Hence, defendants application is dismissed as completely misconceived. Consequently, further, the plaintiffs' oral application for withdrawal of the amount deposited by the Court Receiver must therefore be granted. The amount deposited by the plaintiff now stands credited to the account of Prothonotary and Senior Master. The Prothonotary and Senior Master shall therefore allow the plaintiffs to withdraw the amounts lying to the credit of this suit.

14) This order is stayed for three weeks.

(SMT. R.S. DALVI,J.)